KEDAH REPORT.

[APPELLATE CIVIL JURISDICTION]

McELWAINE, C.J. S.S. (President), POYSER, C.J. F.M.S. & CAREY, J.

March 8, 1941.

V. KARUPANAN

(Appellant)

vs.

THE EMPIRE THEATRE

(Respondent).

[KEDAH CIVIL APPEAL No. 2 of 1359 (1940)]

Negligence—whether a civil action for death of a human being can be brought in Kedah—Straits Settlements Civil Law Ordinance S. 8—Kedah Courts Enactment Ss. 40, 58—Kedah Courts Enactment S. 11.

The appellant brought an action claiming damages for the death of his daughter. He showed that by the death he had lost the benefit he derived from the earnings of the child. The question was whether section 8 of the Straits Settlements Civil Law Ordinance applied in the State of Kedah, so as to enable the father to bring the action for the death of his child.

Held, that section 8 of the Civil Law Ordinance is part of the law of tort of the Straits Settlements which is to be applied in Kedah in the absence of any Kedah law or custom to the contrary.

Cases referred to:—

(1) *The Vera Cruz,* 10 App. Cas. 59.

(2) *Grant v. Australian Knitting Mills,* 1936 A.C. 85.

Cunningham for the appellant.

Balfour Ross for respondent.

McElwaine, C.J. (S.S.)—President, Kedah Court of Appeal.

This was an action commenced in the Second Division of the High Court of the State of Kedah in which the plaintiff claimed $4,500 under different heads of damages for the death of his daughter Pappa.

No point is taken as to the correctness in the form of the statement of claim which is treated as one for negligence.

The only point is does an action lie at the suit of a father for the death of a child when the father can shew that by the death he has lost the benefit he derived from the earnings of the child: in short does section 8 of the Straits Settlements Civil Law Ordinance (which reproduces the principle of the Fatal Accidents Act 1846) apply in the State of Kedah?

The learned Judge of the Second Division received no assistance by way of argument from the plaintiff (counsel having no right of audience in the Court), the defendants' address having obviously been prepared by counsel. The learned Judge concluded "There is no remedy afforded by Statute law in Kedah for an injury of this type. There is no Enactment in Kedah similar to section 8 of the Civil Law Ordinance which is in force in the Colony. Lord Campbell's Act does not apply to Kedah. For the reasons above stated I dismiss the claim."

The plaintiff appealed to the European Judge of the First Division who after hearing argument dismissed the appeal. The learned Judge in the course of a careful judgment held that "Lord Campbell's Act upon which the provisions of section 8 (of the Colony Civil Law Ordinance) are based gives to the representatives a totally new right of action on different principles". He founded himself on a passage in *Clerk and Lindsell* on Torts 9th Edition at p. 50, "The cause of action given by the Fatal Accidents Acts to the personal representatives or dependants is an entirely different cause of action from that which the deceased would have had". Then, quoting Lord Blackburn in *The Vera Cruz* 10 App. Cases(1) at p. 70. It "is new in its species, new in its quality, new in its principle, in every way new". *The Vera Cruz* was an action *in rem.* The point was, had the Admiralty Division jurisdiction to entertain an action under Lord Campbell's Act for damages for the death of a person killed by collision with a foreign ship? The House of Lords held that a ship cannot be sued under Lord Campbell's Act. I can find no assistance in this case.

Although an action for the death of a human being is a new cause of action it is essentially an action for negligence or other wrong. Section 8 of the Colony's Civil Law Ordinance (Chapter 42) commences "whenever the death of a person is caused by wrongful act, neglect, or default". In this case the claim is to be taken as being based on the negligence of the defendants' bus driver. It is true that the word "negligence" is not used, but the claim alleges that the driver was convicted and though even this is not as clearly expressed as it might be I think it involves a finding by the Magistrate that the defendant was negligent. Of course, no estoppel is created by such conviction, I merely treat the allegation as involving a plea of negligence. Without this negligence there would be no cause of action against the defendants.

An action under Section 8 of the Civil Law Ordinance is an action for a tort. "Negligence where

there is a duty to take care, is a specific tort in itself". *Grant v. Australian Knitting Mills,*[2] at p. 103.

I turn now to the question as to what is the law of Kedah. Section 40 of the Kedah Courts Enactment enacts "The said Court (i.e. The First Division of the High Court) shall, subject to the provisions of this and of all other enactments for the time being in force, have jurisdiction in all suits, matters, and questions of a civil nature". Section 58 enacts "The High Court in both its divisions shall have in respect of all matters within its appellate jurisdiction the power conferred by this Enactment upon the Court of Appeal".

Mr. Balfour Ross informed us that Kellagher, J. had decided about a year ago that the trial division applies the same law as the Court of Appeal applies under Section 11. The correctness of this decision is not challenged. It would be indeed inconvenient if the trial Court and the Court of Appeal were bound to apply different and perhaps contradictory provisions of law to the same subject matter.

Section 11 so far as material reads as follows: "The Court of Appeal shall deal with and determine all appeals and proceedings before such Court in accordance with the provisions of the Enactments passed and to be passed by the State Council and established local customs, and shall, subject to the provisions of such Enactments and to such local customs, apply in all such appeals and proceedings the principles of the law of evidence as laid down in Enactment No. 33 (Evidence), and in matters of Tort and Contract the principles of law and equity in force for the time being in the Colony of the Straits Settlements".

It is not suggested that any enactment or local custom is applicable to affect the duty of the Court to apply in matters of Tort the principles of law in force for the time being in the Colony of the Straits Settlements.

Mr. Balfour Ross argued that this section requires us to apply not the law but the principles of the law and that one of those principles is "*actio personalis moritur cum persona*". If section 11 used the expression "the principles of the Common Law" there would be much force in the argument but the Common Law is not mentioned. I think "principles of law" include principles contained in statutes and this view is strengthened by the words "in force for the time being" which indicate that those principles may alter. As I understand it, the principles of the Common Law never alter though they may be applied to new subject matters, but the principles may be altered by statute. When the section uses the expression "in force for the time being" it contemplates legislation, and such legislation includes the legislation which gives a dependant a right of action for a tort. So long as the right of action is for a tort it seems to me to make no difference that it is a new right of action unknown to the Common Law.

"Principles of law in the matter of torts" may be a somewhat vague expression, but from the use in the same sentence of the phrase "principles of the law of evidence as laid down in Enactment No. 33 (Evidence)" —a Kedah Enactment—it appears that "principles of law" means neither more nor less than the law itself, whether that law is common law or legislation.

Section 8 of the Civil Law Ordinance is part of the law of tort of the Straits Settlements which is to be applied in Kedah in the absence of any Kedah law or custom to the contrary.

For these reasons I would allow the appeal with costs.

If the parties cannot come to a settlement there must be a new trial before the First Division.

The plaintiff will have leave to amend his claim and, of course, the defendants may make any consequential amendments to the defence rendered necessary by the plaintiff's amendments.

Poyser, C.J. (F.M.S.)—I agree.

Carey, J.—I concur.

Appeal allowed.